

75-974

Supreme Court, U. S.
FILED

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WILLIAM W. WIDAK, JR., CLERK

**In the Supreme Court of the
United States**

October Term, 1975

No. 74-2050

WEST PENN POWER COMPANY,
a Corporation,

Petitioner

v.

RUSSELL TRAIN, Administrator of the Environmental
Protection Agency of the United States of America,
MAURICE K. GODDARD, Individually and as Secretary
of the Department of Environmental Resources and the
DEPARTMENT OF ENVIRONMENTAL RESOURCES of the
Commonwealth of Pennsylvania,

Respondents

**ANSWER TO PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR THE
THIRD CIRCUIT FOR RESPONDENTS MAURICE K.
GODDARD AND THE DEPARTMENT OF ENVIRON-
MENTAL RESOURCES, COMMONWEALTH OF PENNSYL-
VANIA**

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COUNTER-STATEMENT OF THE CASE

Petitioner bases its appeal on the argument that since it has a variance from the Pennsylvania sulfur dioxide emission standards granted by the Commonwealth of Pennsylvania, Department of Environmental Resources ("DER"), the United States Environmental Protection Agency ("EPA") should not be allowed to enforce these same standards under the Federal Clean Air Act. DER and its Secretary, Maurice K. Goddard ("Goddard"), assert that Petitioner's argument is not well-grounded either in fact or law.

As to the factual situation, on page 8 of the statement of the case section of its petition for writ of certiorari in the above-captioned matter, Petitioner states that "On September 13 1973, despite the pendency of Petitioner's variance application which, as provided by the implementation plan, operated as an automatic stay of prosecution, the Administrator issued to Petitioner a notice of violation . . . which asserted, *inter alia*, that Boiler No. 33 was in violation of the sulfur emission standards contained in the Pennsylvania implementation plan."

DER and Goddard submit that, to the extent that an "automatic stay of prosecution" existed on September 13, 1973 pursuant to §141.5 of DER's rules and regulations, this stay expired on September 19, 1973 when DER issued an order to Petitioner requiring compliance with said sulfur emission standards on or before June 30, 1976 since a stay of prosecution under §141.5 terminates under that

section when DER acts upon the variance application. Moreover, the DER order of September 19, 1973 which appears as Exhibit A hereto and was presented to the Court of Appeals for the Third Circuit ("Court of Appeals") as Petitioner's Exhibit "B", was conditioned upon Petitioner's full compliance with a schedule or timetable providing for the planning, purchasing, construction, and installation on site of the necessary emission control equipment.

There is no evidence in the record to indicate that Petitioner has complied with any of the conditions set forth in the variance order of September 19, 1973 and, to the contrary, DER submits that Petitioner has not so complied with those conditions. Thus, said variance order itself forms no stay of prosecution. Moreover, Petitioner appealed the order of September 19, 1973 to the Pennsylvania Environmental Hearing Board pursuant to Pennsylvania's Administrative Agency Law and Administrative Code of 1929 and this Board has not yet issued an adjudication based upon said appeal. Pursuant to Section 1921-A of the Administrative Code of 1929, 71 P.S. §510-1921-A, no action of DER shall be final until a person aggrieved thereby exhausts his right of appeal to the Environmental Hearing Board. Therefore Petitioner cannot rely upon said variance order, which is not yet a final order, as a stay of prosecution.

Finally, DER would emphasize the material contained in the footnote on page 10 of Petitioner's petition for writ of certiorari. As is noted there, the Petitioner has already obtained from the Court of Appeals a stay of all EPA enforcement activities until thirty days following the disposition by said Court of Appeals of the Petitioner's petition

for review of the sulfur dioxide emission limitations contained in the Pennsylvania implementation plan. To the knowledge of DER the Court of Appeals has issued no final opinion concerning said petition for review.

RESPONDENTS REQUEST TO BE STRICKEN AS PARTIES SHOULD THIS COURT ISSUE A RULE 25 ORDER GRANTING THE REQUESTED WRIT

DER and Goddard recognize that they are deemed to be parties before this Court in this matter pursuant to Rule 21 (6) of this Court since they were at least nominal parties before the Court of Appeals whose judgment is herein sought to be reviewed. DER and Goddard further recognize that this Court will not receive a motion to dismiss an entire petition for a writ of certiorari, Rule 24 (2).

Nevertheless, pursuant to Rule 24 (2) this Court apparently does consider objections to jurisdiction which are presented, as here, in briefs in opposition to petitions for certiorari.

Furthermore, it would appear that, along with an order granting a writ for certiorari under Rule 25, this Court could order that DER and Goddard be stricken as parties.

DER and Goddard submit that those portions of the lower Court opinions which dismissed the action below as to them have not been raised as issues for review by this Court. Wherefore, Petitioner should be deemed to have waived its arguments with regard to the status of the Respondents, DER and Goddard, as parties hereto by failure to raise these issues in its petition.

In support of this argument Respondent herein would respectfully direct this Court's attention to the following portions of the record.

In its opinion, reprinted as Appendix B to the Petitioner's petition beginning at 42a, the United States District Court for the Western District of Pennsylvania granted the motions to dismiss of both DER and Goddard. A review of the opinion beginning at 54a indicates that the dismissal as to DER was on the basis of the Eleventh Amendment to the Constitution of the United States while that Court found it did not have jurisdiction over Goddard to require him to modify or amend the Pennsylvania state implementation plan.

The Court of Appeals noted in its opinion as reprinted at page 11a of the Petitioner's petition that Petitioner's motion for reconsideration challenged only the dismissal as to Goddard and not the dismissal as to DER. Thus, Petitioner abandoned its attempts to implead DER at the Court of Appeals level.

As to Goddard's status, the Court of Appeals, as reported on page 16a of the Petitioner's petition, held that "The APA [Administrative Procedure Act] provides, in certain instances, for judicial review of agency action. 5 U.S.C. §701 (b) (1) defines 'agency' as 'each authority of the Government of the United States. . . .' The APA does not extend the state agencies. Thus, it could not afford the District Court jurisdiction of West Penn's suit against Goddard, who is Secretary of a Pennsylvania agency." The reasons for granting the writ of certiorari advanced by Petitioner do not assign as an error of the Court of Appeals to be reviewed on certiorari by this Court the aforementioned construction "agency action" under the APA. No other ground of jurisdiction is pressed in said petition. Thus, even if all of the arguments set forth in Petitioner's petition find merit with this Court, the deci-

sion of the Court of Appeals to dismiss the action with respect to Goddard and the decision of the United States District Court for the Western District of Pennsylvania to dismiss the action with regard to DER should stand as the law of this case and these parties should be stricken as parties to the instant action.

Whether or not this Court decides that DER and Goddard should remain as parties to this matter, the following arguments address the issue of whether the writ should be granted. If this Court decides that DER and Goddard should be stricken as parties then the following remarks are to be construed as the arguments of an amicus curiae.

REASONS FOR DENYING THE WRIT

A. The issues raised in this appeal are moot. Pursuant to Rule 19 of this Court "A review on Writ of Certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefore." Keeping this guideline in mind, it should be quite obvious that a writ of certiorari should not be issued in a matter which has become moot. In fact, such a situation would be the opposite of the situation necessitating the issuance of a writ since there would be no important or special reason for the issuance of the writ in a moot situation. The relief initially requested by Petitioner in the District Court and then in the Court of Appeals, to wit, an injunction against the enforcement of a notice of violation issued by EPA until it obtained a declaratory judgment as to whether Petitioner's "tall stack strategy" could produce compliance with the Pennsylvania state implementation plan, has, in fact, already been granted.

As is noted on page 10 in the footnote of the Petitioner's petition and the counter-statement of the case herein, the Petitioner herein has also petitioned the Court of Appeals for review of the Pennsylvania state implementation plan with regard to its tall stack strategy for meeting sulphur dioxide emission standards and said matter is pending before the Third Circuit Court of Appeals.

Furthermore, as noted in the same footnote, on May 19, 1975 the Third Circuit Court of Appeals issued a stay of all enforcement activities by the Administrator of EPA

pending its decision on said petition for review. It is the understanding of DER and Goddard that the Administrator of EPA and the Petitioner have requested the Court of Appeals to approve extensions of said stay through the present date and that said Court of Appeals has granted said extensions. It would therefore appear to be a waste of this Court's valuable time to consider further the above-captioned matter.

B. In addition to the mootness of the appeal, DER and Goddard respectfully suggest that the reasons, individually and collectively, set forth in the numbered paragraphs of Petitioner's petition for granting the writ do not constitute the necessary special and important reasons for issuing the writ, but rather represent specious and questionable arguments concerning a soundly-reasoned opinion of a Court of Appeals.

1. *State variance does not stay federal enforcement.*

The first reason offered by Petitioner for granting the writ is (at numbered paragraph 1) that review of the decision of the Court of Appeals is necessary to clarify federal-state relationships under the Clean Air Act. In this argument, Petitioner, having discussed this Court's opinion in *Train vs. NRDC, Inc.*, 43 U.S.L.W. 4467 (U.S. April 16, 1975), 7 ERC 1735, characterizes the instant case as presenting an important corollary, to wit, whether the Administrator of EPA may ignore a valid variance provision of a state implementation plan by taking enforcement action which conflicts with the provisions of the plan.

Actually, the *Train* case reemphasizes the need for approval of a variance by EPA before that variance can be

considered a part of a state implementation plan under the Clean Air Act. In reaching its decision in that matter this Court upheld the construction of the Clean Air Act proffered by EPA rather than that proffered by certain of the United States Courts of Appeal. At 7 E.R.C. 1739 this Court held that "Without going so far as to hold that the agency construction of the act was the only one it permissibly could have adopted, we conclude that it was, at the very least, sufficiently reasonable that it should have been accepted by the reviewing Court." In this matter EPA and DER, the relevant administrative agencies, both agree that the enforcement activities of EPA are not suspended *per se* by the existence of a variance granted by the state agency unless and until that variance is adopted by EPA as part of the state implementation plan.

Moreover, the Third Circuit Court of Appeals has demonstrated in the instant matter, as well as in *Getty Oil vs. Ruckelshaus*, 467 F.2d 349 (3d Cir. 1972), cert. denied 409 U.S. 1125 (1973), that it knows how to cure the so-called *Getty Oil* dilemma, i.e., federal enforcement pending state review of its implementation plan, by issuing a stay of enforcement against the EPA Administrator where it deems that step to be necessary and/or desirable.

To hold that federal enforcement of a state implementation plan can be automatically suspended by a "proposed" revision to a state implementation plan notwithstanding EPA'S refusal to adopt said revision to that plan would go against the entire history of and need for the Clean Air Act as painstakingly set forth in the *Train* case, *supra*. As this Court noted in *Train*, it is the obligation of EPA to determine compliance of a state implementation plan with achievement of national ambient air quality

goals. The interpretation proffered by Petitioner would frustrate this clear statutory purpose by collapsing the federal state structure to a single layer in which a state could for example, grant a variance on an illegitimate basis and thereby stop EPA as well as its own regulatory agency from taking enforcement action.

Furthermore, even if it is assumed for the sake of argument that on the date that the notice of violation presently appealed was issued an automatic stay of prosecution was in effect in Pennsylvania as to both the Pennsylvania DER, and EPA under 25 Pa. Code §141.5, it is also true that as of September 19, 1973, the date upon which DER issued its variance order, said automatic stay of execution terminated by the terms of §141.5. Thus, following September 19, 1973, the only obstacle to enforcement action was pursuant to the terms and conditions of the order itself.

As stated above in the counter-statement of the case, the aforesaid order (which is attached as Exhibit A) granted a variance running to and including June 30, 1976 with regard to emissions of sulphur compounds. However, the foregoing variance was granted on condition that the obligations set forth in paragraphs a, b, c, d, e, and f of the order were fully met, within the time specified for compliance and, "... on the following further conditions: (1) on or before April 1, 1974, details of the company's plan shall be submitted to the Department [DER] setting forth a detailed description of the methods or devices to be used to control the sulphur dioxide emissions from Boiler No. 33 and a schedule indicating the dates upon which intermediate steps of the plan are to be completed; (2) purchase orders for equipment necessary for compliance with

paragraph of this order shall be placed no later than July 1, 1974, and proof thereof shall be submitted to the Department within five (5) days after such orders are placed; (3) on-site construction or installation of the emission control equipment shall be initiated on or before December 1, 1974 . . ."

There is no evidence on the record that Petitioner has complied with any of the aforesaid conditions. To the contrary, DER respectfully submits it has not received any of the aforesaid plans or purchase orders, nor has construction or installation been initiated in accordance with the aforesaid order. For this reason, whatever protection the aforesaid variance granted against either the state or federal enforcement activities, said variance has become ineffective by the terms of that variance due to the conduct of Petitioner itself and cannot, at this point in time, act as a defensive shield of the Petitioner against either DER or EPA.

2. *This matter is not ripe for judicial review.*

The point raised at paragraphs numbered 2 through 5 of Petitioner's petition, which deal with questions of statutory construction under the Federal Administrative Procedure Act, 5 U.S.C. §§701 et seq., individually and collectively, present no meaningful question to this Court. Assuming for the moment that the Petitioner is correct in its assertion in numbered paragraph 2 that the Administrative Procedure Act, 5 U.S.C. §702, creates an independent jurisdictional grant to the United States District Courts; assuming, as Petitioner suggests in paragraph 3, that the issuance of a notice of violation by the Administrator of EPA is not such "action committed to agency dis-

cretion by law" as to fall under the exclusionary wording of the Administrative Procedure Act, 5 U.S.C. §701 (a) (2); and assuming, further, that the notice of violation presently appealed is a "final agency action", as that term is defined under 5 U.S.C. §704, as suggested in Petitioner's paragraph 4, it, nevertheless, fails to follow that Petitioner is entitled to its day in the federal District Court in this proceeding.

In *Abbott Laboratories vs. Gardner*, 387 U.S. 136 (1967), and *Toilet Goods Association vs. Gardner*, 387 U.S. 156, 87 S.Ct. 1520 (1967), this Court found that, even in those instances where the Administrative Procedure Act would otherwise create an opportunity for judicial review, this opportunity was discretionary on the part of the Court whose review was solicited and the prospective reviewing Court still must determine whether the matter was ripe for judicial review. As this Court stated at *Abbott Laboratories*, supra, at pages 148 and 149, "The injunctive and declaratory remedies are discretionary, and courts traditionally have been reluctant to apply these to administrative determinations unless these arise in the context of a controversy ripe for judicial resolution . . . the problems is best seen in a two-fold aspect, requiring us to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration."

The District Court for the District of Delaware in *Getty Oil vs. Ruckelshaus*, 342 F. Supp. 1006 (DC Del.), 4 ERC 1141 (affirmed and cert. denied supra), withheld jurisdiction to review an order of EPA which is surely, a more "final" act than, as here, a mere notice of violation. The District Court of Delaware found that, although the Administrative Procedure Act did provide a jurisdictional

grant and while review was not foreclosed on the basis of §307 of the Clean Air Act, at least for questions which could not have been raised in the context of an originally filed 307 petition, that Court would refrain from exercising its discretion to grant a stay of enforcement.

In affirming the District Court, the Third Circuit Court of Appeals, in effect, held that the requested stay, which would be a preliminary injunction, was barred by the existence of an adequate remedy at law and/or Plaintiff's failure to exhaust its exclusive statutory remedy, to wit, Plaintiff's failure to pursue a §307 petition to review the state implementation plan before said Court of Appeals.

Since, as stated above, Petitioner has obtained a stay of EPA enforcement of the Pennsylvania state implementation plan provisions with regard to sulphur dioxide pending a decision on its petition for review of those provisions filed with the Third Circuit pursuant to §307, there is no hardship to Petitioner if the District Court refrains from exercising whatever jurisdiction it may have in the instant matter. Furthermore, the matter is much more fit for judicial review under Petitioner's petition to review than in the instant matter. Therefore, under the two-fold test set forth in *Abbott Laboratories* and utilized in, *inter alia*, *Toilet Goods Association* and *Getty Oil* the present matter was properly dismissed by the Courts below.

3. *Issuance of a notice of violation by EPA under the Federal Clean Air Act is not a final agency action under the Administrative Procedure Act.*

The preceding assumption of the finality of agency action was made for the sake of argument only. Actually,

it is the position of DER and Goddard that the Third Circuit Court of Appeals properly resolved all of the questions as to finality of agency action and to this extent said opinion is adopted and incorporated by reference herein. Of special interest is that portion of the Court of Appeals' opinion, reprinted on page 18a of the Petitioner's petition, which holds that a notice of violation is not an appropriate decision point in the administrative procedure to enable a Court to adequately address the issues therein. As the Court of Appeals notes, the state implementation plan standards themselves are analogous to the regulations reviewed in *Abbott Laboratories*, supra, and would have provided a ground for review. Of course, such a review was provided as of statutory right under §307 of the Clean Air Act, but the present Petitioner failed to avail itself of that section. However, the notice of violation issued under the implementation plan is not a "final agency action" or an appropriate review point, since, under section 113a (4), of the Clean Air Act, a petitioner has the right, following receipt of a notice of violation, to discuss the allegations set forth therein and the remedies therefor with EPA at an administrative conference. 42 U.S.C. §1857C 8(a) (4). Only after this conference may the Environmental Protection Agency issue a compliance order. Obviously, it is only after the conference and following the issuance of a specific order that a given "source" understands the manner and the timing in which it is to come into compliance with a state implementation plan.

It is only following these steps that EPA has completed its administrative function of applying its expertise to the particular factual situation of a given "source" and it is only upon such a record that a Court may adequately exercise its rightful judicial review. All the cases cited in

Petitioner's petition on the ripeness issue bear out the above-stated principle set forth in *Abbott Laboratories*, supra, that judicial review of agency action should not be exercised until the agency's expertise is fully exercised; an action is simply not "final" before this point. (Also see *Federal Power Commission vs. Hope Natural Gas Company*, 320 U.S. 591, 64 S.Ct. 281, 88 L.Ed. 333; *Rochester Telephone Company vs. U.S.*, 307 U.S. 125, 59 S.Ct. 754, 83 L.Ed. 1147; *Federal Power Commission vs. Metropolitan Edison Company*, 304 U.S. 375, 58 S.Ct. 963, 82 L.Ed. 1408.)

The due process argument set forth at numbered paragraph 5 of the Petitioner's petition is in reality a ripeness argument in other dress. Essentially, Petitioner repeats its statement that it is somehow unfair to subject Petitioner to the potential of enforcement actions before it has a chance to obtain judicial review of the state implementation plan upon which said actions could be based. Of course, in the instant situation the Petitioner has obtained the stay of enforcement that it solicited at both the state and federal levels. However, even if it had not so obtained a stay at this time, DER and Goddard suggest that the Court of Appeals' arguments with respect to due process were correct and that the instant Petitioner has no right to more than one meaningful day in Court. In this regard, the above-named persons also accept and incorporate by reference the reasoning of the Delaware District Court set forth in *Getty Oil*, supra. Finally, in regard to due process, since due process is, as this Court has often noted, based upon the judicial implementation of an underlying concept of fairness, the above-named persons must point out that the Petitioner is the party seeking to utilize an unfair procedure. It is the Petitioner which is attempting, on the

one hand, to overturn the variance order issued September 19, 1973 by DER in proceedings before the Pennsylvania Environmental Hearing Board and at the same time to use this variance order to protect itself against enforcement actions by both DER and EPA. To compound the unfairness of Petitioner's actions it is seeking to utilize a variance order based upon conditions which it has not fulfilled as a defensive shield.

CONCLUSION

For these reasons, a writ of certiorari should not be issued to review the judgment and opinion of the Third Circuit Court of Appeals.

Respectfully submitted,

DENNIS J. HARNISH

Spec. Ass't. Attorney General

Attorney for Maurice K. Goddard and the Department of Environmental Resources

Of Counsel:

WILSON OBERDORFER, Director,
Bureau of Legal Services

APPENDIX—EXHIBIT A (Petitioner's Exhibit "B")

COMMONWEALTH OF PENNSYLVANIA
Department of Environmental Resources
Fulton National Building
200 North Third Street
P. O. Box 2063
Harrisburg, Pa. 17120

September 19, 1973

Certified Mail #143736

West Penn Power Company

800 Cabin Hill Drive

Greensburg, Pennsylvania 15601

Attention: Mr. Ralph J. Gunkle, Jr.
Secretary-Treasurer

Order No. 73-708-V

Gentlemen:

ORDER GRANTING TEMPORARY VARIANCE

Pursuant to Chapter 141, Section 141.2 of the Rules and Regulations of the Department of Environmental Resources, the West Penn Power Company submitted a petition for a temporary variance dated September 15, 1972 and amended on June 7, 1973 requesting a variance from the air contaminant emissions limitations of Sections 123.11, 123.22 and 123.41 of Chapter 123 for the four boilers located at its Mitchell Power Station in Courtney, Union Township, Washington County, Pennsylvania. Said

petition indicated that said source is presently emitting air contaminants in violation of the limitations set forth in Sections 123.11, 123.22 and 123.41 and is causing air pollution as defined in the Air Pollution Control Act, the Act of January 8, 1960, P.L. 2119, as amended, 35 P.S., §4001, et seq.

The petition as amended seeks a variance from the particulate matter and visible emissions limitations of Sections 123.11 and 123.41 until January 18, 1974 for Boilers Nos. 1, 2 and 3, and until November 1, 1973 for Boiler No. 33. The petition also seeks a variance from the sulfur compound emissions limitations of Section 123.22 until January 18, 1974 for Boilers Nos. 1, 2 and 3, and until June 30, 1985 for Boiler No. 33. Boilers Nos. 1, 2 and 3 are to be converted to oil firing by January 18, 1974. Two alternate plans have been proposed for control of sulfur dioxide emissions from Boiler No. 33. Alternate I provides for the installation of a stack which the company believes would achieve compliance with the ambient air quality standards only, by April 1, 1977 but would not achieve compliance with the emission standards until June 30, 1985. Alternate II provides for the installation of sulfur dioxide control equipment with compliance being obtained by April 1, 1978 or an extended period thereafter.

Upon a review of the petition (a copy of said petition is attached hereto and marked Exhibit "A"), and accompanying materials, testimony (if any) received at public hearing, and upon other information available to the Department dealing with the availability of technology to control sulfur dioxide emissions, the Department finds that:

1. The granting of such a variance may prevent or interfere with attainment or maintenance of ambient air standards within the time prescribed by the Federal Clean Air Act and Rules and Regulations promulgated thereunder.

2. Alternate I does not provide for compliance with Section 123.22 in a reasonable time period and is therefore not acceptable to the Department.

3. The granting of the variance, as requested, for implementation of Alternate II is not reasonable inasmuch as the intermediate dates, and the completion date set forth in the petition do not indicate that the company intends to effect the control of the source as quickly as is reasonably practicable.

Now Therefore, this 19th day of September, 1973, the Department hereby grants a variance and further orders that the West Penn Power Company, its successors and assigns, shall:

(a) on or before June 30, 1976 complete the implementation of Alternate II of the control plan set forth in the aforementioned amended petition for a variance, which plan is hereby incorporated herein and made a part hereof;

(b) complete implementation of the control plan with respect to the control of particulate matter and sulfur compound emissions from Boilers Nos. 1, 2 and 3 and particulate matter emissions from Boiler No. 33 on or before the dates specified in the amended petition which are respectively January 18, 1974 and November 1, 1973;

(c) on and after January 18, 1974 operate its Boilers Nos. 1, 2 and 3 located at its Mitchell Power Station in Courtney, Union Township, Washington County, Pennsylvania, in such a manner as to maintain the emissions of air contaminants to within all applicable limits specified in Chapter 123 of the Rules and Regulations of the Department of Environmental Resources;

(d) on and after November 1, 1973 operate its Boiler No. 33 located at its Mitchell Power Station in Courtney, Union Township, Washington County, Pennsylvania, in such a manner as to maintain the emissions of particulate matter and visible emissions to within all applicable limits specified in Chapter 123 of the Rules and Regulations of the Department of Environmental Resources;

(e) on and after June 30, 1976 operate its aforementioned Boiler No. 33 in such a manner as to maintain the emissions of sulfur compounds to within the limits specified in Chapter 123 of the Rules and Regulations of the Department of Environmental Resources; and

(f) submit quarterly progress reports to the Department of Environmental Resources, commencing on October 1, 1973 and continuing thereafter until compliance with paragraph (a) of this order is achieved:

The foregoing variance is granted on condition that paragraphs (a), (b), (c), (d), (e) and (f) of the foregoing order are complied with within the time specified for compliance and on the following further conditions:

(1) On or before April 1, 1974, details of the company's plans shall be submitted to the Department, setting forth a detailed description of the methods or devices to be used to control the sulfur dioxide emissions from Boiler No. 33 and a schedule indicating the dates upon which each intermediate step of the plan is to be completed;

(2) Purchase orders for equipment necessary for compliance with paragraph (a) of this order shall be placed no later than July 1, 1974, and proof thereof shall be submitted to the Department within five (5) days after such orders are placed;

(3) On-site construction or installation of emission control equipment shall be initiated on or before December 1, 1974.

(4) On-site construction or installation of emission control equipment shall be completed on or before June 1, 1976.

(5) Specifications for a continuous sulfur dioxide and percent opacity stack monitoring and recording system shall be submitted to the Department for approval on or before December 1, 1974.

(6) Commencing July 31, 1975, quarterly monitoring reports containing sulfur dioxide concentrations and percent opacity readings shall be submitted to the Department in accordance with guidelines provided by the Department.

Compliance with the foregoing order shall be obtained in a manner that will not violate the Environmental Protection Statutes and Rules and Regulations promulgated thereunder.

Nothing contained in this order shall be construed to prevent or limit the application of the provisions of Chap-

ter 137 of the Rules and Regulations of the Department of Environmental Resources which relates to air pollution episodes.

Chapter 127 of the Rules and Regulations of the Department of Environmental Resources requires plan approval prior to the construction or modification of an emission source. Applications for such plan approval are enclosed. Please complete these forms and return them, in duplicate, with the plan details required in special condition (1) of this order to Mr. Nicholas Pazuchanics, Regional Air Pollution Control Engineer, Room 850, Kossman Building, 100 Forbes Avenue, Pittsburgh, Pennsylvania 15222.

Any questions in connection with this action of the Department of Environmental Resources, as well as all progress reports, should be directed to the Bureau of Air Quality and Noise Control, Department of Environmental Resources, Fulton National Building, 200 North Third Street, Post Office Box 2063, Harrisburg, Pennsylvania 17120.

Very Truly yours,

JAMES K. HAMBRIGHT, Chief

Division of Abatement & Compliance
Bureau of Air Quality & Noise
Control

Attachments

Notice of Appeal

Rules of Practice and Procedure

Rules & Regulations of the Department of
Environmental Resources

Applications for Chapter 127

Exhibit "A"—Petition for Variance

CERTIFICATE OF SERVICE

The undersigned counsel hereby certifies that copies of this document have been served upon:

Solicitor General of the U.S., Robert Bork,
Department of Justice
Washington, D.C. 20530

Attention: John E. Varnum, Esq.
Appellate Section
Department of Justice

and

Lawrence A. Demase, Esq.
Rose, Schmidt and Dixon
919 Oliver Building
Pittsburgh, Pa. 15222

by depositing same in the United States mail.

DENNIS J. HARNISH, ESQ.

*For Respondent Respondents DER
and Maurice K. Goddard*